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Nos. 79-52 and 79-53

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT Z. NAIFEH, PETITIONER

v.

UNITED STATES OF AMERICA

LOUIS ABRAHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3)[1] is unreported. The opinion of the district court (Pet. App. A5-A6) is unreported.

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[1]"Pet. App." refers to the appendix to the petition in No. 79-52.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1979. The judgment of the court of appeals was amended and a petition for rehearing was denied on June 15, 1979 (Pet. App. A4). The petitions for a writ of certiorari were filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order denying a motion to dismiss an indictment on double jeopardy grounds is final and appealable where petitioners have never been subject to former jeopardy.

2. If the order is appealable, whether petitioners' claims are ripe for review.

STATEMENT

On December 7, 1978, a grand jury in the Western District of Oklahoma returned a one-count indictment charging the defendants with price-fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Pet. App. A2). The indictment named as defendants Central Liquor Company, Jarboe Sales Company, petitioner Naifeh, and petitioner Abraham. Petitioners Naifeh and Abraham are partners in Central Liquor and Jarboe Sales, respectively. All defendants pleaded not guilty.

Petitioners moved to dismiss the indictment against them as individuals, alleging that their prosecution would violate the Double Jeopardy Clause of the Fifth Amendment (Pet. App. A5). They contended that the indictment of a partnership and one of the partners therein places the partner in "jeopardy" of double punishment, because the criminal proceedings may result in the imposition of fines on both the partnership and the individual partner (Pet. App. A2). The district court denied the motions to dismiss (Pet. App. A5-A6), and petitioners sought immediate review.

The court of appeals dismissed the appeals (Pet. App. A4).[2] It observed that petitioners "have yet to be put in jeopardy for the first time," and concluded that the right to immediate appeal of double jeopardy claims arises only when a defendant has been subject to one prosecution and his motion to dismiss a subsequent prosecution is denied (Pet. App. A3).

ARGUMENT

We note at the outset that it is not entirely clear whether the court of appeals held that the district court's denial of the motion to dismiss was not an appealable order, or whether it assumed that the order was appealable and held that petitioners' claim on the merits was not ripe for review. The court of appeals' opinion suggests that it followed the latter path. It begins, "[t]hese appeals present double jeopardy questions which are not ripe for reivew" (Pet. App. A2). After discussing the various contentions, the opinion states, "[s]ince the defendant must first be put in jeopardy before a claim can be made that the double jeopardy clause is violated, these [petitioners], who have yet to be put in jeopardy for the first time, cannot advance a double jeopardy challenge" (Pet. App. A3). And after distinguishing *Abney* v. *United States*, 431 U.S. 651 (1977), the court originally concluded, "[w]e affirm the district court's overruling of the [petitioners'] motion to dismiss the indictment" (Pet. App. A3).

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[2]The court of appeals initially affirmed the district court's order (Pet. App. A3), but the judgment was amended to state that the appeals were dismissed (Pet. App. A4).

However, in response to petitioners' motions for rehearing, the court of appeals amended the judgment to state, "[t]he appeal is dismissed" (Pet. App. A4), thus implying that the appeal itself was improper, presumably because the district court's order was not appealable.

Petitioners have assumed that the court of appeals' dismissed their appeals as not "final" under 28 U.S.C. 1291, and contend that it erred in doing so (Naifeh Pet. 8-14; Abraham Pet. 6-12). Petitioners suggest that this Court grant certiorari, vacate the judgment of the court of appeals, and remand the cases to that court for consideration of the merits of their double jeopardy claim (Naifeh Pet. 15; Abraham Pet. 12).

Assuming for present purposes that the court of appeals dismissed petitioners' appeal on these grounds, we believe that it was correct in doing so. Moreover, the court's conclusion that petitioners' claim under the Double Jeopardy Clause was not ripe for review is correct.

1. The court of appeals had jurisdiction only if the district court's order denying petitioner's motions to dismiss the indictment was a "final decision[] of the district court[]" under 28 U.S.C. 1291.[3] The district court believed its order was final under that section, relying on *Abney* v. *United States*, *supra*, and *United States* v. *Martinez*, 562 F. 2d 633 (10th Cir. 1977) (Pet. App. A6). That belief was erroneous.

[3]Petitioners did not seek certification of the district court's order under 28 U.S.C. 1292(b) and the district court did not certify its ruling under that section.

Abney held that a denial of a defendant's motion to dismiss the indictment on the ground of former jeopardy was a "final decision" appealable under Section 1291. But the primary reason for that conclusion was that the Double Jeopardy Clause "assures an individual that, among other things, he will not be forced * * * to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney* v. *United States*, *supra*, 431 U.S. at 661. "Obviously," said this Court, "these aspects of the guarantee's protection would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* at 662 (footnote omitted). It followed that a defendant's double jeopardy challenge to a second prosecution "must be reviewable before that subsequent exposure occurs." *Ibid.*

But the Court also noted that the Double Jeopardy Clause's protection "against being *twice convicted* for the same crime * * * can be fully vindicated on an appeal following final judgment * * *" (*Abney* v. *United States*, *supra*, 431 U.S. at 660; emphasis added), and thus the "special considerations * * * which justify a departure from the normal rule of finality * * * do not extend beyond the claim of former jeopardy * * *." *Id.* at 663. Here, petitioners' claim is not one of former jeopardy. They have yet to be tried even once. Rather, their claim under the Double Jeopardy Clause implicates the quite distinct protection against multiple punishment. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Their contention is essentially that, if they are tried together

with their respective partnerships, and if both the individual and the partnership are convicted,[4] and if the trial court imposes a separate punishment on each, then the individual will have been twice punished—once in his individual capacity and once as a member of the partnership.

Regardless of the merits of such a theory (see note 7, *infra*), there is no reason to extend the rule of *Abney* to such claims. If petitioners and their partnerships are convicted, and if they are punished separately, they will be entitled to full appellate review of their double jeopardy claim and any other claim they might wish to raise. Unlike *Abney*, where review following trial would be an empty remedy because the second trial itself is the evil the Double Jeopardy Clause was meant to preclude, appellate review of petitioners' convictions can adequately protect them against double punishment, if such protection is due them, because the court of appeals—or this Court—can eliminate that portion of the punishment that violates the Double Jeopardy Clause. See *Jeffers* v. *United States*, 432 U.S. 137, 157-158 (1977) (plurality opinion), 160 (concurring opinion). Thus petitioners do not come within the "former jeopardy" rule announced in *Abney*, and there is no reason to extend *Abney*'s limited holding to them.[5]

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[4]A partnership may be indicted and convicted for a violation of the Sherman Act. *Western Laundry and Linen Rental Co.* v. *United States*, 424 F. 2d 441, 443 (9th Cir.), cert. denied, 400 U.S. 849 (1970). But "* * * the conviction of a partnership cannot be used to punish the individual partners, who might be completely free of personal guilt." *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 127 (1958).

[5]There is thus no substance to petitioners' claim (Naifeh Pet. 13-14; Abraham Pet. 8) that the court of appeals' ruling introduces a "fact-specific focus on each particular appeal" (Naifeh Pet. 13) to determine whether it is allowable under 28 U.S.C. 1291 and *Abney*. Courts will be quite able to determine whether a motion to dismiss an indictment under the Double Jeopardy Clause is based on a claim of successive prosecutions or of multiple punishments. If this is a "fact-specific" inquiry, it is not a difficult or uncertain one.

United States v. *Martinez*, *supra*, on which the district court also relied in stating that its order was final and appealable, provides no further support. The defendants in *Martinez* moved to dismiss an indictment on grounds of former jeopardy, *i.e.*, that they had previously been acquitted of the same offense, and thus the Double Jeopardy Clause barred the second prosecution. The Tenth Circuit, correctly relying on *Abney*, held that the district court's denial of defendants' motion was final and appealable under Section 1291. *United States* v. *Martinez*, *supra*, 562 F. 2d at 634 n.1.

Petitioners contend (Naifeh Pet. 13; Abraham Pet. 8) that the trial itself is what they are seeking to prevent. But there is nothing in the Double Jeopardy Clause that aids a defendant facing trial for the first time.[6] See *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717. Thus petitioners have no right under the Double Jeopardy Clause to avoid trial simply because the partnerships of which they are members are also on trial. Whether they have a right to avoid or reduce their punishment following conviction if the partnerships are also punished is a question that can be reviewed and decided if and when it arises, with no infringement of petitioners' right under the Double Jeopardy Clause to be free of multiple punishments for the same offense.

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[6]*Launius* v. *United States*, 575 F. 2d 770 (9th Cir. 1978), on which petitioners rely (Naifeh Pet. 9; Abraham Pet. 10), is not in point. In that case, the defendants pleaded guilty to an information that charged two counts—a conspiracy to smuggle heroin and a conpiracy to smuggle amphetamines. They were sentenced consecutively on the two counts. But there was only one conspiracy, and hence only one offense. 575 F. 2d at 771. On a motion challenging their sentences under 28 U.S.C. 2255, the district court denied relief, reasoning that there was a distinction, for double jeopardy purposes, between "sequential double punishment"—that is, punishment imposed in a second trial after punishment imposed in a first—and "double

2. The court of appeals thus was correct in holding that petitioners' double jeopardy claims are not ripe for review. For the reasons we have discussed, petitioners' only colorable claim under the Double Jeopardy Clause—the right to be free from multiple punishments for the same offense—can be fully reviewed if and when petitioners and their respective partnerships are both convicted and separately punished. Review at that time will not prejudice any right under the Double Jeopardy Clause because the punishment can be modified, if appropriate, before it is exacted.[7]

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punishment imposed simultaneously"—that is, two punishments imposed at one trial. 575 F. 2d at 771; see *Menna* v. *New York*, 423 U.S. 61 (1975). The Ninth Circuit, reversing the district court, found "no basis for such a distinction." 575 F. 2d at 771.

That decision is of no help to petitioners. It certainly does not stand for the proposition that there is no distinction between the Double Jeopardy Clause's protection against successive prosecutions and its protection against multiple punishments, or that decisions such as *Abney* that construe the former can be uncritically applied to the latter.

[7]Nothing we say in this brief in opposition should be taken as implying that petitioners' claims have merit, even when properly raised. See *Western Laundry and Linen Rental Co.* v. *United States*, *supra*, 424 F. 2d at 443-445.

Judge Hufstedler, specially concurring in *Western Laundry*, stated that the defendant's double jeopardy claim in that case—which is similar to petitioners' claim here—was waived because the defendant pleaded guilty to the indictment and did not raise his multiple-punishment claim until after separate punishments had actually been imposed on the defendant and his partnership. But this Court subsequently held in *Menna* v. *New York*, 423 U.S. 61 (1975), that a guilty plea is not a waiver to a claim of former jeopardy. See *id.* at 62 n.2. And see *Launius* v. *United States*, *supra*. Thus, even if petitioners were to withdraw their not guilty pleas and plead guilty, they arguably would not have waived their claim that the Double Jeopardy Clause precludes separate punishment of a partner and his partnership.

3. Petitioners appear to read the court of appeals' decision as holding that their double jeopardy claims will become ripe for review when jeopardy attaches in their upcoming trial. From this reading, they contend (Naifeh Pet. 10-14; Abraham Pet. 11-12) that the court of appeals' decision will encourage disruptions of trials because defendants in petitioners' shoes must present their double jeopardy motions to the district court and appeal any adverse rulings only after a jury has been sworn.

The court of appeals' decision cannot reasonably be read to encourage such results. It is true that the court quoted from *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) that "jeopardy does not attach, *and the constitutional prohibition can have no application*, until a defendant is 'put to trial before the trier of the facts * * *' " (Pet. App. A3; emphasis by court of appeals). But the question in *Serfass* was whether the government could appeal dismissal of an indictment prior to trial. This Court held that 18 U.S.C. 3731 allowed the government to appeal whenever further prosecution would not be prohibited by the Double Jeopardy Clause (420 U.S. at 387), and that jeopardy had not attached in that case because the jury had not yet been sworn (*id.* at 389). Perhaps the court of appeals could have found a more apt case in support of its conclusion that petitioners' claims were premature, *e.g.*, *Jeffers* v. *United States*, *supra*. But nothing in the court of appeals' opinion implies that petitioners will have a ripe claim, and a right of appeal, if they renew their motions after the jury is sworn and jeopardy attaches in their trial. As noted, their claim will be ripe for adjudication only after the trial court imposes separate sentences on them and their partnerships, if that is in fact what happens.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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